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Nos. 87-2067 & 88-246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JO B. BANKSTON, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH CO., *et al.*,
Respondents.

ROBERT A. BACHE, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH CO., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

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STATEMENT OF THE CASE

The proceedings below and the pertinent facts are correctly stated in the opinion by Judge King, *nee* Randall, for the court of appeals:

This is a consolidated appeal of cases brought by former employees of South Central Bell Telephone Company ("SCB") and American Telephone and Telegraph Information Systems, Inc. ("ATTIS"), whose exclusive bargaining representative was Communication Workers of America, AFL-CIO ("CWA"). The suits, originally filed in state court, alleged breaches of contract and fraudulent misrepresentation by the former employers and the labor union in connection with employment layoffs during the fall of 1984 and the spring of 1986. The defendants asserted that section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, governed the claims and removed the cases to the United States District Court for the Eastern District of Louisiana. The district court subsequently granted the defendants' motions for summary judgment, and the plaintiffs timely appealed from the final judgments dismissing their suits.

The relevant facts presented to the district court are as follows. On January 1, 1984, American Telephone and Telegraph Company ("AT & T") divested itself of the Bell Operating Companies, including SCB, pursuant to court order in federal antitrust litigation. *See United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). In preparing a plan of reorganization, AT & T negotiated with labor unions concerning the continued employment of union members, and on March 26, 1982, AT & T and CWA executed an Amended Memorandum of Agreement ("AMOA"). The AMOA provided, among other things, that the collective bargaining agreement in effect at SCB would continue to apply to employees who tranferred from SCB to a new AT & T subsidiary or affiliate. The AMOA also contained provisions concerning the employment rights of transferred employees; these provisions became the subject of later dispute between ATTIS and CWA and established the basis for the present suits.

In the fall of 1983, all of the plaintiffs in these cases were SCB employees with substantial seniority,

and on or about January 1, 1984, all transferred from SCB to ATTIS (then named American Bell Company). The plaintiffs state that they transferred because company and union representatives assured them of job security at ATTIS, because various informational materials represented that the AMOA guaranteed their continued employment for seven years after transfer, and because SCB told them that the type of work they were doing would be performed at ATTIS in the future. During the fall of 1984, however, ATTIS reduced its workforce and laid off or downgraded the plaintiffs from the first suit (*Bache*). In response, CWA processed grievances on behalf of the *Bache* plaintiffs, which ATTIS denied, but did not proceed to arbitration. CWA states that it made this decision because it determined that the layoffs resulted from economic conditions and thus were contractually permissible.

In August of 1985, ATTIS announced a nationwide elimination of jobs affecting thousands of CWA-represented employees. In response, CWA filed an unfair labor practice charge against ATTIS with the National Labor Relations Board ("NLRB") on October 25, 1985. CWA complained that the 1985 layoffs resulted from divestiture-related reorganization and therefore violated the AMOA. To support its claim, CWA alleged that ATTIS' economic justification for the layoffs was pretextual because ATTIS was assigning overtime work to, and contracting out work of, targeted work groups in many locations. On January 29, 1986, the NLRB Regional Director rejected CWA's position that the AMOA imposed restrictions on ATTIS' ability to reduce its workforce and dismissed the charge. CWA appealed the adverse ruling to the NLRB, which affirmed the decision on April 26, 1986.

ATTIS laid off the plaintiffs from the second suit (*Bankston*) in March 1986. No grievances were filed to protest these layoffs, but the *Bankston* plaintiffs contend that this omission resulted from CWA's refusal to represent them in the grievance process.

> The *Bankston* plaintiffs also assert that they have been denied preferential rehiring rights provided by the AMOA. They have not grieved these claims but similarly contend that CWA has refused to represent them in this regard.
>
> On October 30, 1986, the district court entered summary judgment in *Bache* on the ground that there were no genuine issues of material fact concerning the plaintiffs' claims under section 301 of the LMRA. . . . The court found that the terms of the applicable collective bargaining agreement and the AMOA permitted ATTIS to layoff and downgrade transferred employees and that, therefore, there was no breach of contract as a matter of law. The court also found that the plaintiffs offered no evidence that CWA acted in bad faith, with malice, or in a discriminatory manner when it determined that arbitration was unwarranted and thus they failed to demonstrate unfair representation. Accordingly, the court held that the plaintiffs were bound by the results of the grievance proceedings. In *Bankston*, the district court granted summary judgment on the basis of its previous decision in *Bache*. [App. A-11-20 (footnote omitted).] [1]

In affirming the district court's decisions, the court of appeals found it unnecessary to reach the contract claims "because the plaintiffs' failure to establish an essential element of their claims—that the union breached its duty of fair representation—is dispositive of this appeal." App. A-24.

REASONS FOR DENYING THE WRIT

1. The *Bache* plaintiffs acknowledge that CWA explained its decision not to arbitrate their grievance by "stating that it made this decision unilaterally because it determined that the lay-offs resulted from economic conditions which were permissible under the CWA's inter-

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[1] All references are to the Appendix to the petition in *Bankston v. American Telephone & Telegraph Co.*, No. 87-2067.

pretation of the language of the Amended Memorandum of Agreement (AMOA)." *Bache* Pet. 6. Similarly, the *Bankston* plaintiffs state that, in explaining the union's decision not to grieve their layoffs, "CWA informed petitioners that CWA had filed suit with the National Labor Relations Board ("NLRB") against ATTIS and that the Regional Director of the NLRB had determined that the AMOA did not guarantee seven years of employment." *Bankston* Pet. 8.

The courts below found CWA's decisions not to arbitrate the plaintiffs' grievances for these reasons to be a permissible exercise of its authority. With respect to the *Bache* grievance, the court of appeals held:

> CWA's decision not to invoke arbitration after evaluating the merits of the *Bache* plaintiffs' grievances according to its interpretation of the AMOA constituted a permissible exercise of its discretion. [App. A-50.]

Similarly, with respect to the *Bankston* grievance, the court of appeals found:

> CWA decided to seek relief from the NLRB concerning the scheduled layoffs that ATTIS announced in 1985, and its complaint to the NLRB included the same allegations that the plaintiffs sought to assert. At the time that the *Bankston* plaintiffs' grievances arose, the NLRB Regional Director had already rejected CWA's interpretation of the AMOA, and unless CWA pursued a remedy in that forum, arbitration of similar grievances appeared futile. [App. 51-52.]

The plaintiffs do not deny that CWA's decisions rested on the union's evaluation of the merits of their grievances. At most, they hint that alleged earlier misrepresentations by CWA regarding the AMOA's protection of employees may have affected the union's ability to fairly represent them. *Bankston* Pet. 18-19, 21-22. The plain-

tiffs do not develop this point in their petitions, and they studiously avoid describing the alleged misrepresentations. The courts below carefully examined the union's communications regarding the AMOA. The court of appeal's opinion demonstrates that the union not only distributed the full text of the agreement, but expressly "referred to the possibility of layoffs during the seven-year period." App. A-40-41. As the district court pointed out, several provisions of the AMOA itself actually discuss the possibility of layoffs. App. C-9-10. Thus, the plaintiffs have failed to establish any misrepresentation on CWA's part, much less that it affected the union's decision on handling their grievances.

"In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." *Vaca v. Sipes*, 386 U.S. 171, 194 (1967). The plaintiffs do not seriously dispute that CWA did just that in determining their grievances did not warrant arbitration. Since there is no genuine dispute with respect to this issue, the courts below were correct in granting summary judgment for the defendants.

2. The *Bankston* plaintiffs assert that "a motion for summary judgment on the Section 301 breach of contract issue at this point in the proceedings was inappropriate, and should have been delayed until discovery could be conducted." *Bankston* Pet. 25. The *Bankston* plaintiffs' contract claim is "that they were guaranteed seven years of employment." *Id.* at 23. The district court found this claim to be without merit because the AMOA on its face contemplates layoffs. App. C-9-11. Moreover, the plaintiffs' failure to show that the union breached its duty in failing to arbitrate their contract claim is fatal to their attempt to raise it in court. *Vaca v. Sipes*, *supra*, 386 U.S. at 186. The plaintiffs did not respond to the summary judgment motions by filing an affidavit explaining

why a continuance to allow discovery was necessary, as provided in Rule 56(f), Fed.R.Civ.P.[2] Even now, they do not suggest how discovery could salvage their contract claim from the language of the agreement and the union's articulated reason for refusing to arbitrate their grievance. There is, therefore, nothing to suggest that the district court abused its discretion in ruling on the motions when it did. From their discussion of this procedural issue, the *Bankston* plaintiffs slide into a discussion of collateral estoppel, Pet. 27-30, which has nothing whatever to do with the basis of the district court's judgment.[3]

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[2] The *Bankston* plaintiffs were apparently motivated by a desire to catch up with the *Bache* appeal then pending in the Fifth Circuit. The *Bankston* plaintiffs successfully moved to consolidate the two cases in the court of appeals, and none of the issues identified in their opening brief to the Fifth Circuit concerned the district court's exercise of discretion in ruling on the summary judgment motions when it did. The *Bankston* plaintiffs did assert that they should have been allowed more time for discovery in their reply brief, but this assertion was made in response to the defendants' showing that their affidavits had been insufficient.

[3] With respect to their claim that CWA failed to represent them in their claims for preferential rehiring, the court of appeals found that "the *Bankston* plaintiffs failed to produce evidence, except by vague affidavits with identical conclusory statements, that they have presented these grievances to CWA seeking its representation." App. A-54. In the face of CWA's showing that no such grievances had been requested, this was insufficient to avoid summary judgment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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